RECENT CASE NOTES

ADVERSE POSSESSION—CLAIM OF RIGHT—GOOD FAITH.—The plaintiff had been in possession of the land in question for more than thirty years under a claim of right, but in 1899, before the statutory period of ten years had run, a judgment was rendered against him in an action to quiet title. The record title to the land later passed to the defendant, but the plaintiff continued in open and hostile possession for another eighteen years. The plaintiff sought to quiet title in himself and to restrain the defendant from entering the premises. *Held,* that such relief should be refused, because the plaintiff's possession subsequent to the judgment of 1899 lacked such good faith in his claim of right as would enable him to assert title through adverse possession. *Bryan v. Christianson* (1920, Iowa) 176 N. W. 702.

It is generally held that the adverse possession which is requisite to establish title and to bar the rights of the ousted owner must be actual (as to part of the land), hostile, visible, notorious and exclusive, continuous for the statutory period, and under claim or color of title. See Ballantine, *Claim of Title in Adverse Possession* (1919) 28 YALE LAW JOURNAL, 219. The question whether good faith is an essential element of adverse possession is the subject of considerable conflict. It has been said that the conflict, not only between different jurisdictions but within the same jurisdiction, defies reconciliation. See *Lampman v. Van Alstyne* (1896) 94 Wis. 417, 426, 69 N. W. 171, 174. It would seem, however, that the trend of decisions since that day has been largely in one direction. The early view that the statute of limitations operated by a presumed acquiescence on the part of the ousted owner favored the growth of the requirement of good faith, since bad faith on the part of the possessor obviously rebutted the presumption. *Cf. Louisville & N. R. R. v. Smith* (1907) 125 Ky. 336, 101 S. W. 317. The prevalent, and seemingly more accurate, view is that the statute is one "of repose." *Lampman v. Van Alstyne, supra; McAllister v. Hartzel* (1899) 60 Oh. St. 69, 53 N. E. 715. Its object is not to aid the guilty disseisor, but to penalize the negligence of the owner in not bringing his action within the prescribed period. See COMMENT (1919) 29 YALE LAW JOURNAL, 91, 95. The statute being based on the lapse of time, its very nature is to mature "a wrong into a right" by cutting off the remedy. *Humbert v. Trinity Church* (1840, N. Y. Sup. Ct.) 24 Wend. 587. To hold that good faith is necessary to make possession adverse is simply to magnify the state of mind of the party and to dwarf his acts. *Cf. McAllister v. Hartzel, supra.* Much confusion has arisen from the failure to distinguish between good faith as one of the *evidential* facts determining whether or not the possession was really hostile, and good faith as an *operative* fact in creating "adverse possession." *Cf. Johns v. Johns* (1914) 244 Pa. 48, 90 Atl. 535; see *Roe v. Doe ex dem. Tennessee Coal, Iron & Ry. Co.* (1909) 162 Ala. 151, 158, 50 So. 230, 232. A few jurisdictions in that minority group which still regards color of title, i. e. some instrument purporting to convey the property, as an essential element in adverse possession, hold that good faith is also necessary. *Stone v. Kansas City & W. B. Ry.* (1914) 261 Mo. 61, 169 S. W. 88; *West v. Middlesex Banking Co.* (1914) 33 S. D. 465, 146 N. W. 598. Constructive adverse possession under color of title almost always requires it. The great weight of authority, however, would seem to be against the necessity of good faith as to land actually occupied, even under color of title. 15 L. R. A. (N. S.) 1233, note. There is no decision of recent years which holds squarely with the principal case that good faith is necessary to a claim of right. It would seem that the Iowa courts, while they are consistent with their own historic rule

as frequently laid down, are opposed to the weight of modern authority, and by thus preventing a trespasser from relying on the statute of limitations are destroying an important effect of the statute.

BILLS AND NOTES—AGREEMENT TO RENEW.—The plaintiff orally agreed with the defendant's agent some time before the defendant's note came due to renew it at maturity for four months, upon payment of interest then due and $250. Prior to the maturity of the note the defendant's agent tendered the new note, the interest, and $250, which the plaintiff refused. He then brought an action on the original note. The defendant pleaded that the action was prematurely brought as the period had not expired for which the note sued upon was to be renewed. *Held,* that the plaintiff should recover, with a *dictum* that the defendant might have redress in another action on the breach of contract to renew. *West v. Jones* (1919, Del.) 108 Atl. 675.

The decision is in accord with the general (though inadequate) rule that though a contract to forbear for a definite time to sue upon a contract is itself a valid contract, if supported by a consideration, the contract to forbear cannot be pleaded in bar to an action brought on the original contract, although the time of forbearance has not elapsed. *Bridge v. Tierman* (1865) 36 Mo. 439; *Brown v. Shelby* (1891) 4 Ind. App. 477, 31 N. E. 89; see Daniel, *Negotiable Instruments* (6th ed. 1913) secs. 158, 159. The cases agree with the principal case in following the doctrine of *Ford v. Beech* (1847) 11 Q. B. 852. But in that case the agreement to renew was made after maturity, whereas in the principal case it was made prior to maturity. For the effect of the parol evidence rule where the agreement is contemporaneous with the note, see (1919) 28 YALE LAW JOURNAL, 823. It is conceivable that the breach of such an agreement might cause irreparable damage, as where the maker of the note, relying on the agreement, might not make arrangements to meet it, and become financially embarrassed. Where the legal remedy is inadequate, executory accords have been enforced in equity, if tender has been made. See (1920) 29 *ibid.,* 114. It has been suggested that an accord like the one in the principal case might be sustained as an equitable defence, giving to the defendant an irrevocable power to extinguish his former duty by tender. See Corbin, *Discharge of Contracts* (1913) 22 YALE LAW JOURNAL, 513, 529; see Wald, *Pollock on Contracts* (Williston's ed. 1906) 833; *cf. Innes v. Munro* (1847) 1 Exch. 473. Nevertheless there seems to be no case which so holds. Such an agreement does operate, however, to release a surety on the original note. *Bank v. Woodward* (1829) 5 N. H. 99; *Windhorst v. Bergendahl* (1907) 21 S. D. 218, 111 N. W. 544. This would tend to indicate that the payee's right arising from the note should be suspended until the time agreed upon had expired. It seems clear that to allow the equitable defence would avoid circuity of action.

CARRIERS—TORTS OF SERVANTS—CONTRACTUAL DUTY TO CARRY SAFELY.—The plaintiffs employed the defendant, a private carrier, to convey their goods, which the defendant's driver stole. The defendant had not been guilty of any negligence in selecting the driver. *Held,* that the plaintiff should not recover, because the defendant had not held out the driver as one having authority to do the act which caused the loss. *Mintz v. Silverton* (1920, K. B.) 36 Times L. R. 399.

Manifestly in the instant case in tortiously converting the goods, the driver of the defendant was not acting within the scope of his employment, and the maxim *respondeat superior* does not apply. *Cf. Cheshire v. Bailey* (1904, C. A.) 21 Times L. R. 130. In the United States, also, the defendant is not responsible for the driver's tort on this theory. *Cf. Vandeymark v. Corbett* (1909) 131 App. Div. 391, 115 N. Y. Supp. 911. The defendant, however, having lawfully acquired possession of the plaintiff's goods as bailee for hire, was under a duty